IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ELECTION PETITION NO. 16 OF 2004

Shri Hindurao Tukaram Shelke,)
Age 50 years, Occ. Social Service,)
R/at 13/364, Datar Mala,)
Ichalkaranji, Tal. Hatkanangale,)
Dist. Kolhapur.)...Petitioner.

V/s

Shri Prakash Kallappa Awade,)
Age 52 yrs, Occ. Business,)
R/of House No. 1314, Indukala,)
Awadenagar, Ichalkaranji,)
Tal. Hatkanangale,)
Dist. Kolhapur.)...Respondent.

Mr. Amit B. Borkar for the petitioner.

Mr. M.L. Patil with Mr. T.S. Ingale and Mr.S S Jinsiwale for the respondent.

CORAM: V.M. KANADE, J.

DATE: 26th October, 2005

ORAL JUDGMENT:

1. Heard the learned Counsel for the petitioner and the learned Counsel for the respondent.

2. Petitioner has filed this Election Petition under section 81 of the Representation of the People Act, 1951 (hereinafter referred to as "the said Act"), challenging the improper rejection of the nomination paper filed by the Petitioner in respect of the

Assembly Election which was to be held in respect of Assembly Constituency at Ichalkaranji, District - Kolhapur.

3. Brief facts are as under:-

4. The elections to the Assembly Constituency AC No.278 of Ichalkaranji, District - Kolhapur were announced and the election programme was announced by the concerned authorities. The petitioner filed his nomination papers for contesting the said election on 21/09/2004. The admitted position is that, before he filed his nomination papers, he was convicted by the trial court on 30/04/2003 for having committed an offence punishable under sections 147, 353 and 427 of the Indian Penal Code and he was sentenced to suffer rigorous imprisonment for two years for the offence punishable under sections 147, 353 and 427 and for six months for the offence punishable under section 146. Against the said judgment and order passed by the trial court, he preferred an appeal before the District Court being Regular Criminal Appeal No. 38 of 2003. This appeal was admitted and the Second Ad-hoc Additional District Judge was pleased to pass an order under section 389 of the Criminal Procedure Code and was pleased to suspend the order of

conviction and sentence passed by the trial court. It is an admitted position that no reasons were recorded while staying the conviction and sentence so suspended by the appellate court.

5. On 23/09/2004, the nomination papers of the petitioner were rejected by the Returning Officer on the ground that he had incurred disqualification as laid down under section 8(3) of the said Act. The result of the elections was declared on 14/10/2004 and the respondent was declared to be elected in the said election. Thereafter, the present Election Petition was filed within time by the Petitioner and the notice was issued to the respondent. The respondent appeared in the Court and filed his Written Statement on 22/08/2005. The following issues were framed by this court on 19/09/2005.

I S S U E S

(i) Whether the nomination paper of the petitioner is wrongly and improperly rejected and the election of the respondent is liable to be declared void as per the provisions of section 100[1][c] of the Representation of People Act?

(ii) Whether the Written Statement of the Respondent can be taken on record since it is filed beyond the period of 90 days from the date of service of summons and since there is no prayer for condonation of delay?

(iii) Whether the respondent proves that the present Election Petition is not maintainable as the same does not disclose cause of action and, consequently, is liable to be rejected on that ground?

(iv) Whether the respondent proves that the present Election Petition is not maintainable for non-joinder of necessary party to the Election Petition and, on that ground, the Petition is liable to be rejected?

(v) Whether the Petitioner proves that he was fully qualified to contest the election of Maharashtra State Legislative Assembly Constituency No. 278, Ichalkaranji?

6. On 17/10/2005, the learned Counsel appearing on behalf of the petitioner, on instructions, submitted

that he did not wish to lead oral or other documentary evidence and an undertaking was given that he would file a praecipe signed by the Petitioner in this regard by the next date. Accordingly, a praecipe was filed by the petitioner on 25/10/2005.

SUBMISSIONS:

7. The learned Counsel appearing on behalf of the Petitioner submitted that the Written Statement had not been filed within the period of limitation. He invited my attention to the Judgment of the Supreme Court in the case of Kailash Vs. Nankhu and Others reported in **(2005) 4 SCC 480** wherein the Supreme Court had laid down guidelines regarding the procedure which is to be followed in case of Election Petitions while considering the question of granting permission to the respondent to file written statement beyond the statutory period prescribed by Order 8 Rule 1 C.P.C. He invited my attention to the conclusions which were summed up by the Supreme Court in para 46 of the said judgment. He submitted that no explanation has been offered by the respondent as to why there was a delay in filing the written statement beyond the period of 90 days. He, thereafter, submitted that the principal issue which was involved in this case was as to

whether the order passed by the Returning Officer, rejecting his nomination on account of the alleged disqualification which was incurred by the petitioner under section 8(3) of the said Act was proper or not? He submitted that since there was no dispute regarding the basic facts regarding the conviction of the petitioner and also suspension of sentence and conviction by the District Court, the entire issue could be decided without leading any evidence. He, therefore, submitted that the petitioner had chosen not to lead any oral evidence in the matter. He submitted that so far as the said issue is concerned, the learned Single Judge of this Court in the case of Bharamu Subrao Patil Vs. Narsingrao Gurunath Patil reported in **2001(2) Mh.L.J. 348** had held that if the conviction and sentence of the candidate was suspended by the Court while exercising its power under section 389 of the Criminal Procedure Code then, in that event, such a candidate was entitled to contest the election. He invited my attention to para 2 of the said judgment in which a similar issue, as involved in this case, was considered by the learned Single Judge. He submitted that the learned Single Judge relying upon two judgments of the Supreme Court in the case of Rama Narang Vs. Ramesh Narang and others reported in (1955) 2 SCC 513 and in the case of Vidya Charan

Shukla Vs. Purshottam Lal Kaushik reported in (1981) 2 SCC 84 had held that effect of suspension of sentence and conviction by virtue of the order passed under section 389 of the Criminal Procedure Code was that the candidate was entitled to contest the election on account of the said order which was passed by the Court.

8. He submitted that the ratio of the said judgment and order is squarely applicable to the facts of the present case. He submitted that the date on which the nomination papers were filed by the petitioner, the conviction and sentence passed by the trial court had been stayed by the appellate court and, therefore, there was no disqualification as envisaged under section 8(3) of the said Act and, therefore, his nomination papers were improperly rejected and, as a result, the entire election of the respondent was liable to be set aside. He submitted that the ratio laid down in the case of K. Prabhakaran Vs. P. Jayarajan reported in **(2005) 1 SCC 754** was not applicable to the facts of the present case and that the said judgment of the Supreme Court was distinguishable, so far as the facts of the present case are concerned. He submitted that the judgment in K. Prabhakaran's case (supra) was delivered after

that matter was referred to the larger Bench when certain doubts were expressed by the three judges' Bench of the Supreme Court about the correctness of the view taken in the cases of Vidya Charan Shukla vs. Purshottam Lal Kaushik reported in (1981) 2 SCC 84 and Manni Lal V. Parmai Lal reported in (1970) 2 SCC 462 which was also the view expressed by the Division Bench of the Supreme Court and, therefore, they had directed that the matter be placed for consideration by the Constitution Bench. He submitted that from the perusal of the three questions which were referred for the consideration of the larger Bench of the Supreme Court, it is clear that they were entirely in respect of the facts of the said case and the issue regarding the effect of the order passed by the Court while exercising its jurisdiction and power under section 389 of the Criminal Procedure Code was not directly concerned. He submitted that, in the said case, the correctness of the judgment in the case of Vidya Charan Shukla (supra) and in the case of Manni Lal (supra) was being considered. He submitted that since the questions which came up before the Supreme Court were different, any observation made by the Supreme Court in respect of the other matters has no relevance to the facts of the case in hand and, therefore, the ratio of the said judgment was not binding as

precedent under Article 141 of the Constitution of India. He invited my attention to the judgment of the Supreme Court in the case of Director of Settlement, A.P. and Others Vs. M.R. Apparao and another reported in **(2002) 4 SCC 638** regarding the binding nature of the Supreme Court's Judgment. He invited my attention to para 7 of the said judgement.

9. The learned Counsel appearing on behalf of the petitioner also tried to distinguish the judgment in the case of B.R. Kapur Vs. State of T.N. and another reported in **(2001) 7 SCC 231** which was relied upon in the compilation of cases which was submitted by the learned Counsel appearing on behalf of the respondent. He submitted that, in the said case, the principal issue which fell for consideration before the Supreme Court was : whether the person who is convicted of criminal offence and whose conviction had not been suspended pending appeal, can be sworn in and continue to function as Chief Minister of the State? He strenuously urged that the entire ratio of the judgment centred around this issue regarding continuation of such person as Chief Minister of the State, whose conviction had not been suspended, pending the appeal. He submitted that, therefore, the observations made by the Supreme Court in the said

case cannot be taken out of context. The said observations would be applicable only with reference to and in the context of the facts of the said case.

10. The learned counsel appearing on behalf of the petitioner also submitted that the objection raised by the respondent in his Written Statement regarding non-joinder of the Returning Officer as a party-respondent was not tenable as no allegations were made by the petitioner against the Returning Officer. He submitted that since no allegations had been made against the Returning Officer and, further, no declaration is sought by the petitioner that if the election of the returned candidate is set aside, either the petitioner or the other candidate should be declared as having won the election, there was no necessity to add the Returning Officer as party-respondent in the present Petition. He submitted that the cause of action had arisen on account of improper rejection of the nomination papers even though the conviction and the sentence inflicted by the trial court had been stayed by the appellate court.

11. The learned Counsel appearing on behalf of the respondent has relied upon the judgment in the case of

K. Prabhakaran (supra) and the judgment of the Karnataka High Court in the case of Dr. Sarvabhoum S. Bagali vs. Ravikant Patil in Election Petition No. 4 of 2004. He submitted that the ratio of the judgment in Bharamu's case (supra) was not applicable to the facts of this case as the judgments on which reliance was placed by the learned Single Judge of this Court in the case of Vidya Charan Shukla (supra) and in the case of Manni Lal (supra) had been overruled and, further, even the ratio of the judgment in the case of Rama Narang's case (supra) on which reference and reliance has been placed by the learned Single Judge was not applicable to the facts of the present case as, admittedly, in the case of Rama Narang, it was held that if the reasons for staying the conviction and sentence had been recorded by the Court passing the order under section 389, in that event, a candidate would be entitled to contest the election as if there was no imprisonment. He submitted that even otherwise the said observation in Rama Narang's case (supra) had been overruled by the observation made by the Constitution Bench in the case of K. Prabhakaran (supra). He invited my attention to paras 42 and 52 of the said judgment in the case of K. Prabhakaran. He submitted that the Supreme Court in K. Prabhakaran's case had distinctly taken into

consideration the effect of the order of suspension of conviction and sentence which was passed by the Court and he submitted that the said question was no more res-integra and this decision of the Supreme Court was binding on this Court. He submitted that, therefore, Election Petition was liable to be dismissed with costs.

FINDINGS AND CONCLUSION:

12. In the present case, a very short question falls for consideration before this Court and i.e. what would be the effect of suspension of the order of conviction and sentence passed by the trial court by the appellate court while exercising power under section 389 of the Criminal Procedure Code?

13. The admitted facts of this case are that the petitioner was convicted by the trial court on 30/4/2003 for an offence punishable under sections 146, 147, 353 and 427 of the Indian Penal Code and the sentence was imprisonment for two years in respect of the offence punishable under section 147, 353 and 427 and six months in respect of the offence punishable under section 147. Thereafter nomination papers were filed by the petitioner on 21/09/2004. Prior to that,

he had preferred an appeal against the order of conviction and the appeal was admitted on 5/5/2003 and, on 6/5/2003, the appellate court had suspended the order of conviction and the sentence passed by the trial court without assigning any reason.

14. In my view, it would be relevant to consider the purpose of incorporating the disqualification which was introduced in the said section 8(3) of the said Act with effect from 15/3/1989. The Constitution Bench of the Supreme Court in the case of K. Prabhakaran (supra) has very succinctly expressed its view in respect of the purpose of introducing the said incorporation in para 54 of its judgment which reads as under:-

> "54. The purpose of enacting disqualification under Section 8(3) of RPA is to prevent criminalisation of politics. Those who break the law should not make the law. Generally speaking, the purpose sought to be achieved by enacting disqualification on conviction for certain offences is to prevent persons with criminal background from entering into politics, and the House - a powerful wing of governance. Persons with criminal background

> do pollute the process of election as they do not have many a hold barred and have no reservation from indulging in criminality to win success at an election. Thus, Section 8 seeks to promote freedom and fairness at elections, as also law and order being maintained while the elections are being held. The provision has to be so meaningfully construed as to effectively prevent the mischief sought to be prevented. The expression "a person convicted of any offence" has to be construed as "all offences of which a person has been charged and held guilty at one trial". The applicability of the expression "sentenced to imprisonment for not less than 2 years" would be decided by calculating the total term of imprisonment for which the person has been sentenced."

The Supreme Court, in the said case was called upon to consider three questions which fell for consideration which are formulated in para 17 of the said judgment which read as under:-

"17. Three questions arise for decision:

. (1) Whether an appellate judgment of a date subsequent to the date of election and having a bearing on conviction of a candidate and sentence of imprisonment passed on him would have the effect of wiping out disqualification from a back date if a person consequent upon his conviction for any offence and sentenced to imprisonment for not less than 2 years was disqualified from filing nomination and contesting the election on the dates of nomination and election?

. (2) What is the meaning to be assigned to the expression - "a person convicted of any offence and sentenced to imprisonment for not less than 2 years" as employed in sub-section (3) of Section 8 of the Representation of the People Act, 1951? Is it necessary that the term of imprisonment for not less than 2 years must be in respect of one single offence to attract the disqualification?

. (3) What is the purport of sub-section (4) of Section 8 of RPA? Whether the protection

against disqualification conferred by subsection (4) on a member of a House would continue to apply though the candidate had ceased to be a Member of Parliament or Legislature of a State on the date of nomination or election?

It is no doubt true that the issue before the Constitution Bench of the Supreme Court has arisen has a result of the view expressed by the three judges'Bench regarding the correctness of the view taken by the Supreme Court in the case of Vidya Charan Shukla (supra) and in the case of Manni Lal (supra). While considering the said issue, the Supreme Court had taken into consideration all the factors which were necessary for setting at rest the controversy which was raised on account of the view expressed by the three Judges' Bench of the Supreme Court in Civil Appeal No. 1283 of 2001. In this background, it would be relevant to consider the observations of the Supreme Court in paras 40, 41 and 42 of its judgment in the case of K. Prabhakaran (supra) which read as under:-

"40. We are clearly of the opinion that Manni Lal case and Vidya Charan Shukla case do not lay down the correct law. Both the decisions are, therefore, overruled."

"41. The correct position of law is that nomination of a person disqualified within the meaning of sub-section (3) of Section 8 of RPA on the date of scrutiny of nominations under Section 36(2)(a) shall be liable to be rejected as invalid and such decision of the returning officer cannot be held to be illegal or ignored merely because the conviction is set aside or so altered as to go out of the ambit of Section 8(3) of RPA consequent upon a decision of a subsequent date in a criminal appeal or revision".

"42. What is relevant for the purpose of Section 8(3) is the actual period of imprisonment which any person convicted shall have to undergo or would have undergone consequent upon the sentence of imprisonment pronounced by the court and that has to be seen by reference to the date of scrutiny of nominations or date of election. All other

factors are irrelevant. A person convicted may have filed an appeal. He may also have secured an order suspending execution of the sentence or the order appealed against under Section 389 of the Code of Criminal Procedure, 1973. But that again would be of no consequence. A court of appeal is empowered under Section 389 to order that pending an appeal by a convicted person the executor of the sentence or order appealed against be suspended and also, if he is in confinement, that he be released on bail or bond. What is suspended is not the conviction or sentence; it is only the execution of the sentence or order which is suspended. It is suspended and not obliterated. It will be useful to refer in this context to a Constitution Bench Judgment of this Court in Sarat Chandra Rabha v. Khagendranath Nath. The convict had earned a remission and the period of imprisonment reduced by the period of remission would have had the effect of removing disqualification as the period of actual imprisonment would have been reduced to a period of less than two years. The Constitution Bench held that the remission of

sentence under Section 401 of the Criminal Procedure Code (old) and his release from jail before two years of actual imprisonment would not reduce the sentence to one of a period of less than two years and save him from incurring the disqualification. (Emphasis supplied by me).

> "An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court".

Therefore, the Supreme Court, while considering the core issue also expressed and considered the effect of order which was passed by the Court under section 389 of the Criminal Procedure Code, 1973 and, in terms held that even if the order of conviction and sentence was suspended, what was suspended was not conviction or sentence but only the execution of the sentence or order was suspended and not disqualification. The Supreme Court, thereafter, went on to refer to the judgment in the case of B.R. Kapur Vs. State of T.N. reported in (2001) 7 SCC 231 and also reiterated and approved the observation made by the Supreme Court in the said case. It would, therefore, be relevant to refer to para 43 of the said judgment in the case of K. Prabhakaran (supra) which reads as under:-

> "43. In B.R. Kapur v. State of T.N. a similar question, though in a little different context, had arisen for the consideration of the Constitution Bench. Vide para 44 (SCC p. 298), the Court did make a reference to Vidya Charan Shukla case but observed that it was a case of an election petition and, therefore, did not have a bearing on the construction of Article 164 of the Constitution which was in

issue before the Constitution Bench. Obviously the consideration of the correctness of the law laid down in Vidya Charan Shukla case was not called for. However, still the Constitution Bench has made a significant observation which is very relevant for our purpose. The Constitution Bench observed (vide SCC p. 298, para 44)-

. "There can be no doubt that in a criminal case acquittal in appeal takes effect retrospectively and wipes out the sentence awarded by the lower court. This implies that the stigma attached to the conviction and the rigour of the sentence are completely obliterated, but that does not mean that the fact of the conviction and sentence by the lower court is obliterated until the conviction and sentence are set aside by an appellate court. *The conviction and sentence stand pending the decision in the appeal and for the purposes of a provision such as Section 8 of the Representation of the People Act are determinative of the disqualifications provided for therein."* (emphasis supplied)

To the same effect are observations contained in para 40 also."

In para 44 of the said Judgment, the Supreme Court finally laid down the ratio in respect of question No.1 which was raised in para 17. Para 44 of the said judgment reads as under:-

"44. We are, therefore, of the opinion that an appellate judgment of a date subsequent to the date of nomination or election (as the case may be) and having a bearing on conviction of a candidate or sentence of imprisonment passed on him would not have the effect of wiping out disqualification from a back date if a person consequent upon his conviction for any offence and sentenced to imprisonment for not less than two years was actually and as a fact disqualified from filing nomination and contesting the election on the date of nomination or election (as the case may be)."

In view of the observations made by the Supreme Court, in the case of K. Prabhakaran (supra), it is not possible to accept the submissions made by the learned Counsel appearing on behalf of the petitioner that these observations of the Supreme Court in the case of K. Prabhakaran (supra) are not binding on this Court or that the said observations do not amount to ratio on the issue which is principally raised in this petition. Thus, the submissions made by the learned Counsel appearing on behalf of the petitioner that the ratio of the judgment in the case of K. Prabhakaran (supra) and B.R. Kapur's case (supra) is not binding on this Court as it is not in respect of the issue raised in this petition, cannot be accepted. In my view, the principal issue which is raised in this petition is squarely covered by the ratio of the judgment of the Supreme Court in the case of K. Prabhakaran (supra) and in the case of B.R. Kapur (supra). In a similar case, the learned Single Judge of the Karnataka High Court in Election Petition No. 4 of 2004 in the case of Dr. Sarvabhoum S. Bagali (supra) also has taken a similar view and by relying upon the aforesaid two judgments in the case of B.R. Kapur (supra) and K. Prabhakaran (supra) has held that merely because the order of conviction and sentence is stayed that would not obliterate the order

of conviction and sentence which is imposed by the trial court.

15. As regards the reliance which is placed by the learned counsel appearing on behalf of the petitioner on the judgment of the learned Single Judge of this Court in the case of Bharamu Subrao Patil (supra), in my view, the ratio of the said judgment will not be applicable to the facts of the present case, apart from the fact that the said ratio has been overruled as a result of the judgment of the Constitution Bench in the case of K. Prabhakaran (supra).

16. Under the circumstances, there is no merit in the submissions made by the learned Counsel appearing on behalf of the petitioner. The ratio of the judgments of the Supreme Court in the cases of K. Prabhakaran (supra) and B.R. Kapur (supra) is squarely applicable to the facts of the present case. The purpose for introducing section 8(3) in the said Act was to ensure that the persons who are convicted and sentenced to suffer imprisonment for a period of not less than two years are not allowed to contest the elections and thus prevent criminalisation of politics. The salutary purpose of introducing the said section 8(3) is to ensure that the persons who are elected to the

assembly and the parliament are completely above-board and are the persons having high moral character and integrity irrespective of their political leanings. The legislature introduced the said provision after it observed the general decadence and falling standards of persons who contest the elections for the assembly and the parliament and, therefore, the legislature felt that this trend was not in the best interest of the sovereignty, unity and integrity of this country. If persons having tainted moral character and who are declared by the competent court to be the law breakers, the legislature felt that such people were disqualified for the purpose of being elected as the law makers. It would be an ironical situation if such persons whose nominations are rejected on account of their conviction and sentence by the trial court are allowed to challenge the election of a returned candidate and on some technical ground the election of such a returned candidate is allowed to be set aside. This, surely, cannot be the intention of the provisions of section 100 (1)(C) of the said Act. In my view, the Returning Officer has correctly rejected the nomination papers of the petitioner as he had incurred disqualification under section 8(3) of the said Act.

17. It is no doubt true that the Written Statement has been filed in August, 2005. However, since admittedly, even according to the Petitioner, the issue involved in this petition pertains to interpretation of the provisions of section 8(3) of the said Act and the order passed by the District Court under section 389 of the Criminal Procedure Code, I do not see any reason why Written Statement should not be taken on record. The objection raised by the petitioner regarding delay in filing the Written Statement by the respondent cannot be accepted. In any case, the Supreme Court has observed that ordinarily the Court has to take into consideration the cause for the delay and that unless delay has been caused deliberately it should not reject the Petition hence there is no reason as to why the Written Statement should not be taken on record. The said objection raised by the petitioner regarding delay in filing the Written Statement cannot be accepted. Accordingly the issues framed are answered as under:-

ISSUES	**FINDINGS**
(i) Whether the nomination paper of the petitioner is wrongly and improperly rejected and the election of the respondent is liable to be declared void as	

per the provisions of section 100[1][c] of the Representation of People Act?	**In the negative.**
(ii) Whether the Written Statement of the Respondent can be taken on record since it is filed beyond the period of 90 days from the date of service of summons and since there is no prayer for condonation of delay?	**In the affirmative**
(iii) Whether the respondent proves that the present Election Petition is not maintainable as the same does not disclose cause of action and, consequently, is liable to be rejected on that ground?	**In the negative.**
(iv) Whether the respondent proves that the present Election Petition is not maintainable for non-joinder of necessary party to the Election Petition and, on that ground, the Petition is liable to be rejected?	**In the negative.**
(v) Whether the Petitioner proves that he was fully qualified to contest the election of Maharashtra State Legislative Assembly Constituency No. 278, Ichalkaranji?	**In the negative.**

18. The Election Petition is accordingly dismissed. In the circumstances, there shall be no order as to costs.

(V.M. KANADE, J.)